BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

Stated in the petition, supra.

JURISDICTION.

Stated in the petition, supra.

STATUTE INVOLVED.

The pertinent provisions of the statute involved, are:

California Code of Civil Procedure, Section 1881 (5),

which reads as follows:

"A public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."

RULES INVOLVED.

Federal Rules of Civil Procedure, Rule 43 (a), which reads as follows:

"Rule 43. Evidence.

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States

or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Rule 227 of the *Model Code of Evidence*—Presented by the American Law Institute,

which proposes the following rule of evidence:

"Rule 227. Secret of State.

(1) As used in this Rule, 'secret of state' means information not open or theretofore officially disclosed to the public concerning the military or naval organization or plans of the United States or a State or Territory, or concerning international relations.

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible unless the judge finds that

(a) the matter is not a secret of state, or

(b) the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action."

ARGUMENT.

1. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT WALSH AS THE BRITISH MINISTRY OF WAR TRANSPORT ON THE PACIFIC COAST, WAS NOT COMPETENT TO DETERMINE THAT THE CORRESPONDENCE CONTAINED SECRETS OF STATE AND THEREFORE WAS INADMISSIBLE.

The Circuit Court in its opinion states the reason for its ruling in the following language (R. 689):

> "Does this mean that Walsh is the final authority on that point? All reason says that the question is one for the Court to determine."

The English case of *Beatson v. Skene* (1860), 5 Hurlst. & N. 838, 157 Eng. Rep. (Reprint) 1415, at 1421, 9 A.L.R. 1103 note, explains the reason why the determination must be made by the head of the department having the custody of the papers in the following language:

> "We are of opinion that if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises how is this to be determined.
>
> "It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine without ascertaining what the document was and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private and which taking place in *public* may do all the mischief which it is proposed to guard against.
>
> "It appears to us, therefore, that the question whether the production of the documents would be

> injurious to the public service must be determined, not by the Judge but by the head of the department having the custody of the paper;"

The correspondence admittedly concerned the purchase not only of the H. F. Alexander and Emma Alexander, but other vessels (R. 532), by the British Government. The Special Master explained his refusal to order the production of the correspondence in his certificate and report (R. 49) as follows:

> "As I then saw the situation and as I still do anything which in view of the war might tend to make public secrets of state of the British Government also might be to the detriment of the United States Government, the ally de facto, if not de jure, of the British in their fight against dictatorship."

In the Southern District of New York, Circuit Judge Lacombe in the case of *Kessler v. Best,* 121 Fed. 439, stated, with respect to the objection that the documents were privileged as belonging to the German consulate, that the privilege was that of the German Government and not of the witness. So, in this case, the privilege was that of the British Government, to whom the correspondence belonged, under the testimony of the witness, and could not be produced without the waiver of the privilege by the British Government.

This ruling is shown as one of the reasons for the proposed Rule 227 of the *Model Code of Evidence,* presented by the American Law Institute, as shown by the comment following the rule, which states that

the rule is phrased in terms of privilege and of admissibility so that either the witness or a party may object to a question calling for disclosure.

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2. THE CIRCUIT COURT OF APPEALS ERRED IN MISINTERPRETING THE CALIFORNIA LAW SET FORTH IN SECTION 1881 (5) OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

The Circuit Court of Appeals, in its decision, in referring to Section 1881 (5) of the *California Code of Civil Procedure,* states (R. 689):

> "There are grave doubts whether that statute has any application here. Does it not refer to a 'public officer' of California, only? By its terms it applies only to communication 'made to him'."

The demand of the respondent was for all of the correspondence of the British Ministry relating to the Steamships H. F. Alexander and Emma Alexander, whether written by the witness Walsh or by members of the British Ministry at New York. Prior to the enactment of the Rules of Federal Procedure, the Circuit Court of Appeals for the Eighth Circuit, in the case of *First Trust Company of St. Paul v. Kansas City Life Insurance Co.,* 79 F. (2d) 48, by Circuit Judge Stone, states:

> "In so far as such privilege exists it does so in accordance with statutory requirement and the statute involved is that of the state where the action is tried. (Conn. Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 253-256, 5 S. Ct. 119, 28 L. Ed. 708; Mutual Benefit L. Ins. Co. v. Robison, 58 F. 723, 730-732, 22 L.R.A. 325 [C.C.A. 8])—in

this instance the above section of the Minnesota statutes."

There appears to be no statute of the United States allowing the admission of correspondence containing "secrets of state". The fact that the American Law Institute in its *Model Code of Evidence,* Rule 227, presents the rule, not only of privilege of the witness, but of inadmissibility to be exercised by either the witness, the party, or even the judge, shows that the statute of California, properly interpreted, excludes the evidence.

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3. THE CIRCUIT COURT OF APPEALS ERRED IN ASSUMING JURISDICTION AND REVERSING THE DECISION OF THE DISTRICT COURT WHERE ON THE FACE OF ITS OWN OPINION IT HAD NO JURISDICTION.

The opinion of the Circuit Court of Appeals (R. 678) states that there was "neither a petition nor an order disclosing" the jurisdiction of the District Court under 77-B of the Bankruptcy Act and the lack of jurisdiction is apparent under the decisions of this Court in *Clune v. United States,* 159 U. S. 590, 593, 40 L. Ed. 269, and *Redfield v. Parks,* 130 U. S. 623, 624, 625. In its own prior decision, that of *Hutson v. Coffman* (C.C.A. 9th), 100 F. (2d) 640, 641, the Ninth Circuit Court of Appeals held:

> "The record does not contain the petition for involuntary bankruptcy nor the petition of the debtor under 77B of the Bankruptcy Act, 11 U.S.C.A. 207, which are necessary to show the jurisdiction of the Court and the regularity of the proceedings. Cf. 28 U.S.C.A. 790."

CONCLUSION.

It is respectfully submitted that "secrets of state" in this time of war should be held privileged as set forth in Rule 227 of the *Model Code of Evidence,* presented by the American Law Institute, and that a writ of certiorari should be issued.

Dated, San Francisco, California,
April 12, 1943.

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